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No. 1093

In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA, APPELLANT

v.

PHILLIPSBURG NATIONAL BANK AND TRUST COMPANY, SECOND NATIONAL BANK OF PHILLIPSBURG, AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO APPELLEES' MOTION TO STRIKE

ERWIN N. GRISWOLD,
Solicitor General,
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Washington, D.C. 20530

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While the government's position on the merits is adequately set forth in our Jurisdictional Statement, we deem it appropriate to reply to the appellees' motion to strike. Appellees jointly move that all references to certain extra-record public documents [1] lodged by the government with this Court be stricken. We believe that this motion should be denied.

[1] The documents are the appellant banks' application in this case to the Comptroller of the Currency for approval to merge, the Opinion of the Comptroller, and the reports on the merger proposal submitted to the Comptroller by the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Attorney General.

Only to underscore the importance of plenary review in this case has our Jurisdictional Statement "not undertaken to make a fetish of sticking squarely within the four corners of the specific record." *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 530; cf. *Boynton* v. *Virginia*, 364 U.S. 454, 459–463. Accordingly, although we disagree with appellees' suggested application of classic evidentiary precepts,[2] we do not undertake an extended refutation here. Rather, we submit, this appeal presents "matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties." *Market Street Ry. Co.* v. *Railroad Commission*, 324 U.S. 548, 562; cf. *Arnold Productions, Inc.* v. *Favorite Films Corp.*, 291 F. 2d 94, 95 n. 2 (C.A. 2).

Documents comprising mandatory steps in the total merger transaction proceeding (12 U.S.C. (Supp. IV) 1828(c)(4)), which are made public by statute[3] and

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[2] Compare, Appellees' Motion at p. 9, with Record, *United States* v. *Philadelphia National Bank*, No. 83, October Term, 1962, pp. 1019–1021 (reports accepted into evidence), 374 U.S. 321, 361; *United States* v. *First City National Bank of Houston*, No. 914, October Term, 1966, Brief for the Comptroller of the Currency at 59, Brief for the Appellee Banks at 6, Brief for the United States at 83–134, 386 U.S. 361, 364–365. Cf. *Communist Party* v. *Control Board*, 351 U.S. 115, 128 (dissenting opinion); *Thompson* v. *Maxwell Land Grant Co.*, 168 U.S. 451, 456.

[3] Information Act, 5 U.S.C. (Supp. IV) 552; cf. 5 U.S.C. (Supp. IV) 301.

agency rules,[4] and by covenant,[5] and some of which are published,[6] ought to be freely available to this Court. Cf. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, and Report of Argument, 2 U.S.L.W. 325. Copies of these public documents cited in our Jurisdictional Statement have been lodged by us with the Court solely for its convenience.

These documents are not, of course, submitted as evidence; we fully recognize that the district court must try all issues *de novo*, and that the opinions of the banking agencies are in no way binding upon it. *United States* v. *First City National Bank of Houston*, 386 U.S. 361. We note also, however, the statutory mandate that in an action attacking a merger transaction which the government alleges to violate Section 7 of the Clayton Act, "the standards applied by the court shall be identical with those that the banking agencies are directed to apply * * *." 12 U.S.C. 1828 (c)(7)(B). The views of the advisory banking agencies should, therefore, be of considerable interest to the

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[4] All the agency reports are public: 12 C.F.R. 261.4(b) (Federal Reserve); 12 C.F.R. 309.1(3)(i) (Federal Deposit Insurance Corporation); 12 C.F.R. 4.15(a)(2) (Comptroller of the Currency). The Federal Reserve has published an interpretation of the language it uses in its reports, 12 C.F.R. 250.182; 34 Fed. Reg. 11414 (July 10, 1969).

[5] The Application at p. 2 states:

> It is understood and agreed that this application may be made public in a public hearing or otherwise at the discretion of the Comptroller.

See, also, the Comptroller's general rule, 12 C.F.R. 4.16(a).

[6] The opinion of the Comptroller, quoting in part from the Application is published in 1967 Annual Report of the Comptroller of the Currency, 143, 145. A summary of the Attorney General's Report, as required (12 U.S.C. 1828(c)(9)(B)), is appended thereto. *Id.* at 147.

courts. The district court, over defendants' objection, was apprised of the administrative proceedings and agency opinions (Tr. 9–10). We see no policy of sound judicial administration to be served by an attempt to keep this Court in ignorance of them.

Moreover, we believe the wide divergence of view between the advisory agencies and the court below, in discharging their responsibilities under the Act, underscores the need for review by this Court. It is plain that standards of review of small bank mergers are not yet settled. A summary affirmance by this Court of a judgment based on the unorthodox approach of the court below would be duly noted by the bank regulatory agencies. It would be an important factor to be weighed by them in passing upon future merger transactions, many too small to be individually litigated without substantial burden upon the applicants and the government.

The motion to strike should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1970.

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